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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Request for Review of the Decisions of the)
Universal Service Administrator by)
Winston-Salem/Forsyth County Schools)
Federal-State Joint Board on)
Universal Service)
Changes to the Board of Directors of the)
National Exchange Carrier Association, Inc.)

CC Docket No. 96-45

CC Docket No. 97-21

REQUEST FOR REVIEW OF THE DECISIONS OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY
WINSTON-SALEM/FORSYTH COUNTY SCHOOL DISTRICT

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June 20, 2003

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SUMMARY

Winston-Salem/Forsyth County Schools (WS/FCS) requests Commission review of the Funding Decision Commitment letter dated April 22, 2003 issued by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC). Eleven funding requests from WS/FCS for "internal connections" were denied because of alleged "bidding violations." The only explanation for the denial of each funding request was: "Applicant did not identify the specific services sought – either clearly on the 470 or in an RFP – to encourage full competition on major new initiatives." WS/FCS is requesting a Commission review of these eleven decisions denying E-rate funding based on the following grounds:

1. The WS/FCS application for E-Rate funding implements part of a broad technology plan to make major technology improvements in all of the district's schools using locally approved bonds funds, charitable gifts and E-rate funds. The denial of E-rate funding will have a major negative impact on the implementation of the technology plan.
2. WS/FCS did identify the specific services sought on the 470 form to encourage full competition.
3. Other school districts were granted E-rate funds based on 470 forms that *were almost identical or no more specific in describing the services sought than WS/FCS' 470 form.*
4. WS/FCS fully complied with the competitive bidding procedures of the Universal Services Administration as described in federal regulations.

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SPIN: 143005607)	
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**REQUEST FOR REVIEW OF THE DECISIONS OF THE
UNIVERSAL SERVICE ADMINISTRATOR BY
WINSTON-SALEM/FORSYTH COUNTY SCHOOLS**

Winston-Salem/Forsyth County Schools (WS/FCS), pursuant to Section 54.719 of the Commission's rules,¹ hereby submits its Request for Review of the Universal Service Administrator's denying the following funding requests: FRN 842482, 842638, 842757, 844679, 844736, 844923, 844980, 845026, 845059, and 845096.

I. FACTUAL BACKGROUND

WS/FCS is a city/county consolidated school district located in the piedmont of North Carolina that serves over 46,000 students in 67 (and soon to be 70) schools. During the 2001-02 school year, about 15,190 students qualified

¹ 47 C.F.R. § 54.719.

for free meals and another 2,577 qualified for reduced price meals under the provision of the National Child Nutrition Program. About 40% of our students attend schools with high concentrations of low-income families, the target population for federal financial assistance.

In the Fall of 2002, the citizens of Forsyth County, North Carolina passed a \$150 million dollar bond referendum to make many capital improvements in the district's schools. Over \$15 million of the bond funds were budgeted for the implementation of a major technology plan to be implemented over a five-year period. WS/FCS also received donations in cash and pledges in the amount of about \$15 million to provide additional funding for technology through a fund raising campaign known as "Touched by Technology." Those funds, plus E-rate funding, were all to be used to implement WS/FCS's initiative in technology.

Based on its understanding of the purpose and intent of the federal program to support technology initiatives in the nation's public schools, WS/FCS is shocked and dismayed that the School and Library Division has denied its request for funding for "internal connections."

II. WS/FCS APPLICATION FOR E-RATE FUNDING WAS A PART OF A BROADER TECHNOLOGY PLAN TO MAKE MAJOR TECHNOLOGY IMPROVEMENTS IN ALL OF THE DISTRICT'S SCHOOLS USING LOCALLY APPROVED BONDS FUNDS, CHARITABLE GIFTS AND E-RATE FUNDS. THE DENIAL OF E-RATE FUNDING WILL HAVE A MAJOR NEGATIVE IMPACT ON THE IMPLEMENTATION OF THE TECHNOLOGY PLAN.

WS/FCS developed a comprehensive technology plan in preparation for the 2002 bond campaign and for the "Touched by Technology" private funding

effort. The full extent of WS/FCS Technology Plan is shown on the spreadsheet that is attached at Tab 2. This spreadsheet was created for the District's planning purposes. It also was used as an exhibit in the District's "Request for Proposals" (RFP) for the selection of a "Strategic Technology Integration Partner" (STIP), an independent contractor hired to manage the entire project.

By reference to the spreadsheet, one is able to identify fairly quickly the specific technology improvements to be made at almost every school in the District over the next five years as well as the proposed source of funding for those improvements. The improvements to be funded by support from the E-rate program are shown by color-coding.²

The Technology Plan includes, but is not limited to, the following improvements to be funded by various sources as noted on the spreadsheet:

- Adding media/TV and data ports at specific schools;
- Adding racks, cable trays, cable, fiber, intercom, TV and wiring;
- Adding switches and routers;
- Adding Media retrieval systems;
- Adding intercom systems;
- Procuring and installing IP office phone equipment;
- Procuring TV's and mounting them in classrooms;
- Procuring equipment and software for wireless data communications;
- Upgrading electrical systems where necessary; and
- Making necessary architectural and HVAC improvements.

The RFP for the STIP, a copy of which is attached at Tab 3, describes in Section 7 WS/FCS' technology goals and performance expectations for the STIP. Please note that while there is more specificity in this document, it too does not describe the work to be performed with the level of specificity normally found in

² See Tab 2. The color code key appears at the bottom of the second page.

architectural/engineering plans and specifications for construction contracts. Both WS/FCS' 470 form and the STIP RFP are "performance" specifications that ask the vendor or bidder to use its special knowledge and experience in the field of internal connections technology to design the local area networks (LANs) and other integrated communications systems for each school, to determine the specific quantity and quality of technology hardware and software needed to achieve WS/FCS goals at each school; to procure the technology; to install the technology and then to test it to make sure it works as intended.

The STIP RFP also includes designing, bidding and managing the "construction" of electrical and HVAC upgrades, as may be necessary, for the effective installation and operation of the LANS and other integrated communications systems included in WS/FCS technology plan. WS/FCS recognizes that these products and services are not eligible for E-rate funding.

E-rate funding of various internal connections at E-rate eligible schools, as indicated on the chart at Tab 2, is a major and essential element of the funding for the overall technology plan. The denial of these funding requests will have a major negative impact on the success of the new initiative and the financial ability of WS/FCS to complete this project.

While more than seven firms attended various pre-bid meetings and conferences regarding the STIP RFP, WS/FCS received only seven proposals during the pre-qualification of bidders process as described in section 6 of the STIP RFP. It pre-qualified five firms to submit financial proposals but only three of those firms eventually submitted financial proposals. Eperitus, LLC, a Virginia

Limited Liability company located at 211 West Broad Street, Richmond, Virginia, was selected by the WS/FCS to serve as its "Strategic Technology Integration Partner" (STIP). We are still negotiating the language of the Agreement with Eperitus and have not signed the Agreement. However, the most recent draft of the Agreement appears at Tab 4.

Although the STIP RFP was a RFP for non-E-rate services, this section regarding the STIP is included to demonstrate that WS/FCS believes in, is committed to, and utilizes a fully competitive selection process for the award of its contracts. Indeed, WS/FCS awarded the STIP contract to Eperitus, not IBM, even though IBM submitted a bid to be the STIP contractor.

III. WS/FCS DID IDENTIFY THE SPECIFIC SERVICES SOUGHT ON THE 470 FORM TO ENCOURAGE FULL COMPETITION .

A. WS/FCS complied with applicable rules for specifying the services to be sought.

WS/FCS complied with Section 54.504 of the Federal Communication Commission's rules in completing its 470 form and specifically describing the services to be sought. The Universal Service Administrator approved WS/FCS's request for E-rate funding for "Telecommunications Services", Item 8, and "Internet Access" services, Item 9 on WS/FCS 470 form. The specificity of the services sought in these two items is not significantly different from the specificity of the services being sought in item 10, "Internal Connections."

The Federal Communications Commission's rules do not require a school district to draft a formal RFP in order to solicit proposals from vendors for the spending of E-rate funds. The contents of the 470 Form are deemed sufficient

notice. The instructions for completing the form state, by way of example, that a school district might list "'Private Branch Exchange equipment' under Service or Function and 'for each of ten outlets in Library system' under Quantity and/or Capacity." WS/FCS 470 form was completed in a manner consistent with these instructions.

B. SLD unfairly applied unwritten rules, criteria or standards for approval.

WS/FCS agrees that its request for funding involves what may fairly be described as a significant technology initiative. But SLD used the phrase "major new initiative." WS/FCS is not aware of any FCC or SLD rules, regulations or guidelines that define the term "major new initiative" or that impose higher standards or greater requirements for specificity in drafting the contents of the 470 form or for bidding the work. The term is not defined on the SLD website or in the instructions for completing the 470 form. However, it appears that WS/FCS's funding request was denied in part because the SLD determined that its request was for a "major new initiative" and that WS/FCS did not comply with some unwritten or unspecified rules, criteria or standards for approval of funding for major new initiatives.

Apparently, the use of the term "major new initiatives" arose from an FCC ruling involving the Brooklyn Public Library.³ However, the term "major new initiatives" does not appear in the FCC ruling. The issue addressed by the FCC

³ Request for Review of the Decision of the Universal Services Administrator by the Brooklyn Public Library, Brooklyn, New York; Federal-State Board on Universal Service, CC Docket No. 96-45, 15 FCC Rcd. 18598 (2000) (*Brooklyn Public Library*)

in the *Brooklyn Public Library* ruling was whether a telecommunications carrier could recover in the first year of a multi-year contract all of the capital investment that otherwise would be recovered through recurring charges over the term of the contract. The FCC ruled that the carrier could not recover in the first year of the contract as up-front charges all of the capital investments that would occur during the life of the contract. The FCC held that this would have been an impermissible "prepayment " or "advance payment."⁴ No such request for advance payment is contemplated in WS/FCS's request for funding.

If WS/FCS funding has been denied because WS/FCS is engaged in a significant technology initiative, then the SLD has violated its duty to enforce the Commission's rules and has instead engaged in impermissible rule making on its own. The Congress has explicitly directed that the USAC be limited to enforcing FCC rules.⁵ The Commission has emphasized that USAC and USAC's Schools and Libraries Division (SLD) can perform only administrative functions and not make policy, interpret unclear provisions of the statutes or rules, or interpret the intent of Congress.⁶ SLD is "prohibited from making decisions of law or policy" and must limit its activities "to implementing existing rules and policies established by the Commission."⁷ SLD's use of a standard or criteria for approval of funding based on "major new initiatives" has no precedent in Commission rules or orders.

⁴ Id. at ¶15.

⁵ See Conference Report on H. R. No. 105-504, 105th Cong. 2d. Sess.

⁶ *Changes to the Board of Directors of the National Exchange Carriers Associations, Inc.*, 13 FCC Rcd. 25058, 25067 (1998).

⁷ Id.

IV. USAC HAS GRANTED THE E-RATE APPLICATIONS OF OTHER SCHOOL DISTRICTS BASED ON 470 FORMS THAT WERE NO MORE SPECIFIC IN DESCRIBING THE SERVICES SOUGHT FOR INTERNAL CONNECTIONS THAN WS/FCS'S 470 FORM.

It is the duty of the SLD, like any other administrative agency, to make its funding decisions fairly and equitably, and to apply the same standards to all applicants. SLD may not act in an arbitrary or capricious manner. Yet SLD granted funding to other school districts based on 470 forms that were no more specific in describing the services to be sought than the contents of WS/FCS 470 form.

WS/FCS's Form 470 in section 10, "Internal Connections," requested funding for various services for 126 buildings, including but not limited to:

- wiring (Cat3, coax, fiber, conduit, wiring accessories);
- routers, servers, switches, hubs and upgrades;
- PBX, KSU, ARS, console, components and upgrades;
- Video CODEC, MCU, MPEG encoder;
- Maintenance/installation, technical support;
- Wireless service, LAN, WAN;
- ATM equipment (edge device, EMMI);
- Hardware and upgrades for internal connections;
- Internal connections components;
- Operational software and upgrades, email software, etc.;
- Construction costs, contingency fees, leasing fees, professional services, per diem, travel and time.⁸

WS/FCS has reviewed the 470 forms submitted by several major metropolitan area, urban school districts whose requests for funding were granted and found that the services described in section 10 on their 470 forms for "internal connections" were either very similar or in some cases virtually identical

⁸ See WS/FCS' 470 Form, Tab 5.

to the descriptions of services on WS/FCS's 470 form.⁹ Among those reviewed by WS/FCS were:

- The Houston Independent School District (Houston), Tab 6,
- San Francisco Unified School District (San Francisco), Tab 7
- Denver School District No. 1 (Denver), Tab 8
- Kansas City School District (Kansas City), Tab 9
- St. Louis City School District (St. Louis), Tab 10
- Los Angeles Unified School District (Los Angeles), Tab 11

The table below shows that each of the service descriptions contained on WS/FCS 470 item 10, "Internal connections" and the corresponding descriptions on the Houston and San Francisco 470 forms were essentially identical.

WS/FCS	HISD	SFUSD
Wiring (Cat3, coax, fiber, conduit, wiring accessories);	Identical	Identical
Routers, servers, switches, hubs and upgrades	Identical	Identical
PBX, KSU, ARS, console, components and upgrades;	Identical	Identical
Video CODEC, MCU, MPEG encoder	Identical	Identical
Maintenance/installation, technical support	Identical	Identical
Wireless service, LAN, WAN	Identical	Identical
Video CODEC, MCU, MPEG encoder	Identical	Identical
ATM equipment (edge device, EMMI....	Identical	Identical
Hardware and upgrades for internal connections ...	Identical	Identical
Internal connections components, ...	Identical	Identical
Operational software and upgrades, email software	Identical	Identical

The SLD also approved funding for the Kansas City, Denver and St. Louis school districts whose 470 forms used descriptions that are broader in scope and

⁹ WS/FCS has not had the time or staff to review ALL of the 470 forms and therefore submits this information as a representative sample.

less specific than those used by WS/FCS, Houston and San Francisco. For example, where WS/FCS specified the types of wiring it would need, Denver's form specified simply, "wiring, internal"; while Kansas City and St. Louis simply specified "internal and external cabling." Los Angeles simply listed in alphabetical order the services that WS/FCS, Houston and San Francisco grouped together.

None of the 470 forms listed or described specific quantities for any particular items or services nor do they include quality specifications for any of the items or services listed. The summary or general descriptions of services to be sought in item ten on the six school district 470 forms cited above were considered by SLD as sufficient to grant funding. To deny funding to WS/FCS based on the alleged inadequacy of its services descriptions is clearly arbitrary and capricious. The "law does not permit an agency to grant one person the right to do that which it denies another similarly situated."¹⁰

V. WS/FCS FULLY COMPLIED WITH THE COMPETITIVE BIDDING PROCEDURES DESCRIBED IN FCC REGULATIONS.

Dr. David Shellman, Assistant Superintendent for Technology, WS/FCS, began talking with potential vendors about WS/FCS's technology needs and its intent to request E-rate funding beginning in October 2001.¹¹ Between October 10, 2001 and January 15, 2002 he met or talked with Cisco Systems, Rauland-

¹⁰ Mary Carter Paint Company v. Federal Trade Commission, 333 F.2d 654, 660 (5th Cir. 1964), rev'd on other grounds, 382 U.S. 46 (1965).

¹¹ See Affidavit of Dr. David W. Sherman, Assistant Superintendent for Technology, WS/FCS at Tab 12.

Borg, Time-Warner, IBM, Tivoli, Bell South, Yorel Integrated Solutions and NCT.¹²

WS/FCS's completed 470 form was posted on the SLD website on November 15, 2001.¹³ During the next 28 days, WS/FCS received a number of telephone inquiries from firms about providing the services being sought in WS/FCS' 470 form. All companies were notified that the 470 was posted seeking their proposals for many of the items or services that Dr. Shellman had discussed with them and that the district would be interested in a comprehensive proposal from each company. After the posting of the 470, all companies that inquired about the procurement were given information necessary to complete a proposal.¹⁴

In addition to IBM, Bell South appeared to be a serious competitor. However, it informed Dr. Shellman that it was primarily interested in selling the Cisco equipment to the district. Once it understood the comprehensive nature and breadth of WS/FCS service needs for internal connections, Bell South decided not to submit a financial proposal.

Despite WS/FCS's best efforts to solicit proposals from other firms, IBM was the only firm that submitted a proposal in response to WS/FCS's 470 form. WS/FCS personnel have considerable knowledge of the costs for the various services it sought and were able to determine independently that the proposal of IBM included fair and reasonable prices.

¹² See List of Companies and Dr. Shellman's Calendar at Tab 13.

¹³ See Form 470 –Receipt Notification Letter dated November 19, 2001 at Tab 14.

¹⁴ Shellman Affidavit, Tab 12.

VI. CONCLUSION

The decision of the SLD to deny the eleven requests for funding of “internal connections” services described on WS/FCS 470 form will have a major negative impact on the District's ability to provide new technology for the most economically disadvantage students served by the school district. Over the next five years, WS/FCS plans to make major capital improvements in our schools. Technology upgrades and improvements are a major component of the District's capital improvement plans. WS/FCS concedes that this process is a significant technology initiative consistent with our Technology Plan. SLD denied WS/FCS's funding request on the grounds that it involved a “major new initiative,” however that term is not defined by SLD. There is no law, rule or regulation that prohibits funding by SLD of a “major new initiative” or establishes any higher standards or criteria for the approval of “major new initiatives.” In the absence of such a law or FCC rule, the SLD has no authority to impose unwritten rules or criteria for its decision-making with regard to “major new initiatives.”

WS/FCS believes it has submitted compelling and persuasive documentation that it identified the specific services sought on its 470 form and in a manner identical to or consistent with other school districts that were approved for funding by the SLD. Therefore, SLD's denial of funding is arbitrary or capricious and must be reversed by the Commission.

Finally, WS/FCS has provided compelling and persuasive documentation of its competitive process and its successful efforts to inform potential service providers of its procurement and should not be faulted or denied funding because service providers decided not to submit proposals.

WS/FCS respectfully requests that the SLD decision denying the following funding requests be reversed: FRN 842482, 842638, 842757, 844679, 844736, 844923, 844980, 845026, 845059, and 845096.

Respectfully submitted,

By: _____

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June 19, 2003

CERTIFICATE OF SERVICE

I, Douglas S. Pungler hereby certify I caused to be served true and correct copies of the preceding Request for Review of Winston-Salem/Forsyth County Schools this the 20th day of June 2003 via hand delivery to the following party:

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